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Thomas  
Nash/R5/USEPA/US  
@EPA

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PM

To: DEENA SHEPPARD/R5/USEPA/US@EPA  
cc: Leverett Nelson/R5/USEPA/US@EPA, Gwendolyn  
Massenburg/R5/USEPA/US@EPA  
Subject: Response to PRP comments

I've attached a draft proposed response to comments made by CRS PRPs on Techlaw's proposed approach for preparing a Waste-in list and Volumetric Ranking for the CRS generator PRPs.

I welcome your comments.

Thanks, Tom

(See attached file: acomresp.rev.wpd)

(c) Thomas C. Nash  
Associate Regional Counsel  
phone: 312-886-0552  
fax: 312-886-7160 or 312-886-0747  
email: nash.thomas@epa.gov

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The United States Environmental Protection Agency (Agency or U. S. EPA) has asked its contractor, Techlaw, to prepare a draft approach for the preparation of a waste-in list and volumetric ranking for the Chemical recovery Systems Site, located in Elyria, Ohio. A copy of the proposed approach was sent to all potentially responsible parties (PRPs) named at the CRS site. The PRPs were invited to comment on the proposed approach. A brief summary of the significant comments received and the Agency's responses is set forth below.

1. One commenter suggested that "sales of commercially useable product should be omitted from the calculation." This comment was made in the context of Techlaw's stated intention not to include shipments to CRS of non-hazardous chemicals like "calcium chloride." The comment makes a valid distinction.

2. Numerous commenters suggested that entries for a shipment found on the "dirty inventory" list should only be included when a corresponding entry was found in other evidence. Numerous variations on this comment were received. Some commenters wanted to see confirmation of a shipment in the accounts receivable ledgers; others insisted entries should not be included in the waste in list unless confirmation of the shipment was reflected in the purchase payment journals.

The documentary evidence at this site comes from a number of different sources, including accounts receivable ledgers, purchase payment journals, accounts payable ledgers, "dirty inventory" lists, invoices, correspondence, and the records supplied by generators in response to Section 104(e) requests. In some cases shipments to the CRS site are documented in multiple sources; many other shipments are documented only once. The Agency and its contractor will not ignore evidence of a shipment of hazardous substance to the site simply because the shipment is only documented once.

3. One commenter asked if the Agency and its contractor will be preparing a "Non-Binding Allocation of Responsibility." At this time at least, the Agency and its contractor is only preparing a volumetric ranking and waste in list. This will provide all parties with a summary of what is known regarding hazardous substances sent to the site by PRPs. The process will not purport to allocate liability or responsibility for environmental harm.

4. A number of comments suggested that the Agency and its contractor disregard evidence that hazardous substances were sent to the site. For instance, some comments objected to witness statements or affidavits being considered in the absence of an opportunity to cross-examine those witnesses. Other comments protested that no documents should be considered unless they could be authenticated pursuant to the Federal Rules of Evidence.

The U.S. EPA's Final Guidance on Preparing Waste-in Lists and Volumetric Rankings Under CERCLA, OSWER Directive 9835, dated February 20, 1991, clearly states that because the lists are not binding and do not serve as preliminary allocations of responsibility PRPs should not be able to successfully challenge waste-in information, although many will undoubtedly dispute EPA's ranking and volumetric attributions. The guidance does not establish the standard which the commenters referred to above seek to impose on the process.

5. One commenter pointed out that some dirty inventory entries fail to state the quantity received in a specific shipment, although the name of the generator, date of shipment and chemical shipped are given. This commenter proposed that the Agency and its contractor not assign a volume "since there is no reasonable method to assign a volume." As to the latter point, reasonable minds may differ as to whether there is a reasonable way to assign a volume. Given the fact that multiple shipments from one generator usually appear on the Dirty Inventory list with quantities that vary only slightly if at all from one shipment to another (*i.e.*, 80 drums, 80 drums, 79 drums, 80 drums) it might be reasonable to assume that the missing quantity is the same as quantities reflected in other shipments by the same generator; however, the Agency and its contractor believe that where the dirty inventory list does not give a quantity, it may be more appropriate not to assign a quantity.

6. The same commenter echoed the request of another commenter that U.S. EPA provide additional opportunities for comment as the process develops. The available guidance (cited above) is replete with cautions to the Regions not to expend unreasonable amounts of time and resources on such processes; however, the Agency will try to keep the PRPs informed as the process develops. Furthermore, to the extent that the Agency shares results with the PRPs, the underlying assumptions and decisions will also be shared, pursuant to the guidance cited above.

7. Another commenter, while confidently asserting his conviction that his client was a *de minimis* contributor to the site, raised objections to: (1) the use of conversion factors to assign quantities to transactions recorded in dollar values; (2) any "additional adjustments" being made to "extrapolations of Site records" without the express, prior approval of this commenter; and (3) the use of "other available information" unless that "other information" is first disclosed to and approved by the commenter.

The Agency has not only given every individual PRPs access to all information tying that PRP to the site (nexus information), the Agency has also made generally available to all PRPs (or to the two groups representing multiple PRPs) all liability information gathered by the Agency thus far. The Agency will not delegate to the PRPs a decision on what information may be considered in this process, nor seek unanimous prior approval from all the PRPs at the Site before considering information. Obviously it would be unfair to allow one PRP or a group to dictate what information could be used for this process. The appropriate use of assumptions and conversion factors where such use is necessary to interpret available information is contemplated by the available guidance which the Agency is considering in organizing this process.

8. Another commenter suggested cross-referencing sources of information (Dirty Inventory lists, Accounts Receivable, witness references, Accounts payable, Purchase payment journals, etc). The comment became rather complex and involved in its expressions and it was somewhat unclear in some aspects, but the commenter seemed to suggest that no source of information be used with regard to any specific shipment unless it was corroborated by another source. The commenter seemed to stop short of requiring every shipment counted to be corroborated in every source of information considered.

While there is some value in cross-referencing the available sources of information, and this line

of analysis will be pursued, the agency and its contractor will not use cross referencing of entries as a tool in the manner suggested, to eliminate entries in one source unless they appear in another source also. Such a course would disregard clear evidence of disposal and unfairly burden a few large companies with a vastly disproportionate share of the waste contributed to the Site.

9. The same commenter also suggested an approach based on an attempt to quantify the amount of reclaimed solvent shipped from the site. Under this commenter's approach all companies that sent solvent to the site would automatically and arbitrarily be assigned a "credit" for a portion of all reclaimed solvent sent from the site by CRS, this "credit" apparently to be calculated as somehow proportionate to the relative amount of solvent sent to the site by each generator.

Attempting to implement this scheme for apportionment of "credit" would unnecessarily complicate the analysis and create a variety of fresh opportunities for error and unfairness by generating a new set of uncertainties and unnecessary and unwarranted assumptions. Since the commenter admits that all shipments of solvent sent to the site were equally likely to spill or leak and create site contamination, the commenter's complex scheme for assigning credit to large generators in proportion to the amount they shipped to the site is patently unnecessary as well as being very unfair to smaller generators.

Furthermore, many of the witnesses in many cases indicated that quite a few of the generators, in particular, large quantity generators, simply used the site for disposal of their waste solvent and never took shipments of reclaimed solvent. Others sent material which could not be reclaimed successfully. Solvent reclaimed and purchased from the site was, more often than not, where evidence of such purchase is available, purchased in small quantities by small companies.

10. Finally, the commenter states approval of the proposed approach in so far as it proposes to extrapolate projected total volumes based on the available evidence. This commenter even goes further and proposes assignment of a volume to a company for a year "in which the evidence indicates the PRP had a relationship with the CRS site, but the relationship is not quantified for that year." The commenter expands on this idea by proposing the amount assigned to that PRP for the unquantified year should be proportionate to a percentage of total volume of solvent received for that year from all sources equivalent to the percentage of total volume sent to the Site attributable to that PRP in a better quantified year.

This suggestion would allow the Agency to vastly increase the estimated total amount of solvent sent to the Site attributable to some PRPs in defiance of an absence of evidence. Fortunately, the data is neither so detailed and complete for some years, nor so empty and impossible to measure in others as this commenter seems to assume. The Agency will not attribute amounts sent to any PRP without some evidence, but it will consider extrapolation from available evidence when it would seem fair and reasonable to do so.

11. Another commenter directed the Agency to attribute waste-in quantities to owners, operators, transporters, and nearby businesses on the theory that wastes from the latter set of parties might have leaked onto the CRS property through groundwater flow, leaking sewer lines or surface water runoff. The commenter cited the guidance quoted earlier in this document in support of his

request that owners and operators be included.

The guidance does say such parties should not generally be included but may be included where the owners or operators also transported or generated wastes sent to the site. As for the suggestion regarding migration of contamination from nearby facilities, available legal precedent does not offer much support for the commenter's theory that neighboring facilities could be held liable for "passive disposal" which might have occurred through the migration of contaminated groundwater from nearby sites.

This preparation of a waste-in list and volumetric ranking is primarily aimed at quantifying the amount of waste sent to the site by specific generator PRPs. It will not purport to apportion or allocate responsibility or liability for cleanup or the costs of cleanup. Such matters are to some extent beyond the scope of this inquiry. However, U.S. EPA will be doing some of the things this commenter requests.

When the records show (as the commenter points out) shipments of solvent sent to the CRS Site in Elyria from the parent company in Michigan, this will be counted against that parent company just like any other generator's contribution. U.S. EPA has sent information requests and in one case a general notice letter, to owners, operators, and one neighboring facility. Additional investigations into the identity and activity of other neighboring facilities are in progress. Where it is possible to find evidence of waste sent to the site and quantify the amount sent, the Agency will count and include that amount in this exercise.

This commenter urged that not one gallon should be double counted. The Agency is trying very hard to ensure that no shipment is counted twice and that no party is unfairly counted as having sent more than it actually did send.

13. The commenter demanded that the Agency be transparent, document "each and every" assumption and provide opportunity for "detailed comment" at "each stage of the development of the Waste-in List/Volumetric Ranking" in order to ensure "transparency." The Agency will follow its guidance, cited above, on the question of information release, by making clear (*i.e.* transparent) all assumptions it uses to reach its conclusions. All PRPs will have an opportunity to comment on any conclusions reached as well as the assumptions employed in the process of arriving at those conclusions.

14. The same commenter points out that the Agency should use scientifically and statistically defensible methodologies when extrapolating on the evidence. The Agency will do so. This would appear to be required by the Agency's guidance, cited above.

15. The commenter suggests not counting shipments that were sent to other sites. The Agency will only count shipments sent to this Site (*i.e.*, where the evidence shows it was sent to the CRS Site located in Elyria, Ohio). The Agency will not make "credits" or "discounts" based on the assumption that some portion of such shipments may have been shipped elsewhere later (as sludge, as reclaimed solvent, or as part of initial site cleanup in the final years the site was in

operation) since there is neither a reason to do so nor sufficient evidence on which to base a “scientifically and statistically defensible methodology” for doing this.

16. This commenter suggested that shipments that may have been, in part, shipped elsewhere, after a period of storage and/or processing at the CRS Site in Elyria, should not be counted. The logic supporting this comment is flawed. As another commenter who offered a similar suggestion admitted, any shipment of hazardous substance sent to the Site could have contributed to Site contamination, regardless of whether any portion of such shipment was subsequently shipped elsewhere; therefore, all shipments sent to the Site will be counted in the waste-in list.

17. This commenter also wanted to order the Agency not to consider any evidence that was not authenticated under Federal Rules of Evidence. Such a requirement is inappropriate for this project, and is not required by the guidance cited above.

18. The same commenter wanted PRPs to be able to furnish additional evidence of disposal. PRPs are welcome to provide additional evidence of shipments sent to the Site, either by their own companies or by others.

No other significant comments on the proposed process were received.